

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In re:
Low Tech Designs, Inc.
Petition for Arbitration

)
) CC Docket No. 97-164
)

**COMMENTS OF THE GEORGIA PUBLIC SERVICE COMMISSION
IN OPPOSITION TO LOW TECH'S PETITION**

The Georgia Public Service Commission ("GPSC") files the following comments in opposition to the petition filed in the above-referenced docket by Low Tech Designs, Inc. ("Low Tech"). In summary, the GPSC submits that the Federal Communications Commission ("Commission") should dismiss Low Tech's petition on the bases that:

1. The Georgia Public Service Commission did not fail to carry out its responsibility under Section 252 of the Telecommunications Act of 1996 ("Act"). Instead, the GPSC took proper action in Low Tech's arbitration when it dismissed Low Tech petition without prejudice as to the underlying merits.
2. Since the GPSC properly dismissed Low Tech's petition for arbitration, and did not fail to carry out its responsibility under Section 252 of the Act, Section 252(e)(5) does not operate to entitle Low Tech to seek arbitration by the Commission.
3. Since the GPSC properly dismissed Low Tech's petition for arbitration, and did not fail to carry out its responsibility under Section 252 of the Act, Section 252(e)(5) does not operate to give the Commission jurisdiction over Low Tech's petition in this matter.
4. Low Tech is not entitled to arbitration with respect to matters of resale, unbundled network elements, or any other matters under Sections 251 or 252, with respect to Georgia because it is not a telecommunications carrier.
5. Low Tech is not a telecommunications carrier, at least with respect to Georgia, because it has not obtained a certificate to provide telecommunications services under Official Code of Georgia Annotated ("O.C.G.A.") § 46-5-163. Therefore the GPSC properly dismissed Low Tech's Georgia petition for arbitration without prejudice as to the merits of the issues raised by Low Tech's arbitration petition.
6. Low Tech's petition seeking arbitration by the FCC is premature, as was its petition to the GPSC, and Low Tech has failed to pursue its appropriate remedy. Low Tech's appropriate remedy is to obtain a certificate from the GPSC, for which Low Tech has already filed an

application, and then seek arbitration by the GPSC if arbitration between Low Tech and BellSouth is still necessary.¹

7. The GPSC has a demonstrated track record of concluding all arbitrations within the statutory time period. These include full-blown arbitrations between BellSouth Telecommunications, Inc. ("BellSouth") and AT&T (GPSC Docket No. 6801-U), MCI (GPSC Docket No. 6865-U), MFS (GPSC Docket No. 6759-U), and Sprint (GPSC Docket No. 6958-U). Other arbitration proceedings have included BellSouth and ACSI (GPSC Docket No. 6854-U) and Cellco Partnership d/b/a Bell Atlantic Nynex Mobile (GPSC Docket No. 7048-U). The GPSC did not fail to act to carry out its responsibility under Section 252 for Low Tech - instead, Low Tech merely disagrees with the GPSC regarding its need to obtain a certificate in order to be recognized as a telecommunications carrier entitled to initiate compulsory arbitration under Section 252.
8. The Commission should give deference to the GPSC's application of Georgia law in the GPSC's conclusion that Low Tech must comply with state law certification requirements before being recognized as a telecommunications carrier for purposes of Section 252 arbitration. Such deference is appropriate in any event, and is mandated pursuant to Section 253(b) of the Act.
9. The GPSC properly found that Low Tech's petition for arbitration must be dismissed without prejudice for lack of jurisdiction, and further ruled that, assuming that Low Tech proceeds to obtain a certificate from the GPSC, then Low Tech may submit a new petition for arbitration. The GPSC even ruled that under the facts and circumstances pertaining to this case, Low Tech will not need to wait 135 days after obtaining a certificate, before submitting a new petition for arbitration.
10. The GPSC declined to address the merits of Low Tech's petition for arbitration, even though it included some dicta indicating concern in its May 19 Order Dismissing Arbitration, regarding the question whether Low Tech's proposed service would constitute a telecommunications service enabling Low Tech to be considered a telecommunications carrier. As the GPSC stated in that Order, that question will properly be addressed in Low Tech's application to the GPSC for certification as a telecommunications carrier. Thus the GPSC properly declined to decide the merits of Low Tech's claims, and the Commission should not reach those merits either. Instead, it should dismiss Low Tech's petition.

¹ In the alternative, to the extent that Low Tech disagrees with the GPSC's decision, its proper remedy is to seek judicial review in a forum that has jurisdiction. The GPSC also emphasizes that it is submitting these comments merely to address this particular issue. By doing so, however, the GPSC does not waive any of its arguments, and reserves all rights to raise any other objections or arguments of law.

BACKGROUND AND PROCEEDINGS

Low Tech filed its petition with the GPSC to initiate a case styled *In Re: Petition by Low Tech Designs, Inc. for Arbitration of Rates, Terms and Conditions with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996* on January 16, 1997, seeking arbitration of rates, terms and conditions for a proposed agreement between it and BellSouth pursuant to Section 252(b) to resolve issues that were the subject of negotiations which began August 19, 1996. Therefore, the statutory deadline was May 19, 1997 in accordance with Section 252(b)(4)(C).

On May 19, 1997, the Commission entered an Order dismissing without prejudice the arbitration petition of Low Tech. The Commission dismissed Low Tech's petition on the basis that Low Tech was not a telecommunications carrier in Georgia, and therefore was not entitled to initiate compulsory arbitration before the Commission under Section 252(b) of the 1996 Act.

On May 27, 1997, Low Tech filed a Motion for Reconsideration, Rehearing and Oral Argument of Commission Order Dismissing the Arbitration. Low Tech's motion asked for a complete arbitration in the docket. In the alternative, Low Tech moved for a formal rehearing and oral argument. Also, if the Commission refused all of the above requests, then Low Tech further requested that the Commission jointly approach the Federal Communications Commission ("FCC") for rulings regarding eligibility for arbitration of the least cost routing service that Low Tech proposes to offer.

The GPSC issued an Order on July 7, 1997 denying Low Tech's Motion for Reconsideration, Rehearing and Oral Argument regarding the Commission's Order Dismissing Arbitration.² In issuing this Order, the Commission affirmed its May 19, 1997 ruling which dismissed Low Tech's arbitration petition for lack of subject-matter jurisdiction on the basis that Low Tech is not a certificated telecommunication carrier in Georgia, and therefore it is not eligible to invoke the arbitration jurisdiction of the GPSC.

In its July 7, 1997 reconsideration order, the GPSC also adopted a recommendation of the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs' ("Consumers' Utility Counsel" or "CUC") that if and when Low Tech becomes certificated to provide telecommunications services in Georgia, it will not have to wait an additional 135 days, after becoming certificated, to file a new petition for arbitration pursuant to Section 252(b)(1) of the 1996

² Copies of the GPSC's two orders in its Docket No. 7270-U dealing with the Low Tech petition for arbitration are attached hereto as Appendices A and B, and incorporated herein by this reference. The GPSC's Order Denying Motion for Reconsideration, Rehearing and Oral Argument, which is attached hereto as Appendix B, bears a date stamp of July 8, 1997, but was signed by the Chairman and Executive Director (acting for the Executive Secretary) on July 7, 1997. Therefore, pursuant to GPSC Rule 515-2-1-.03, the Order is issued and effective as of July 7, 1997.

Telecommunications Act (the "Act") (47 U.S.C. § 252 (b)(1)).³ Thus the GPSC has afforded Low Tech the ability to move directly to the remaining issues in its arbitration, if and when it obtains a certificate of authority as a telecommunications carrier in Georgia.

DISCUSSION OF THE ISSUES AND THE GPSC'S DECISIONS

The GPSC did carry out its responsibility under Section 252 with respect to Low Tech's petition for arbitration, and will do so upon any new petition for arbitration filed by Low Tech. The fact that the GPSC properly dismissed Low Tech's petition cannot be taken as a failure to carry out Section 252 responsibilities. Section 252(e)(5) provides:

COMMISSION TO ACT IF STATE WILL NOT ACT. — If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Low Tech may obtain an arbitration by the Commission only if the GPSC has failed to act to carry out its responsibility under Section 252, which has not occurred in this case. Therefore, Low Tech is not entitled to seek arbitration by the Commission, and the Commission does not have jurisdiction to conduct an arbitration upon Low Tech's petition.

The GPSC properly concluded that it should not and will not consider an entity to be a telecommunications carrier in Georgia, unless and until it has obtained a certificate of authority from this Commission. This requirement is based on the provisions in Georgia's Telecommunications and Competition Development Act of 1995 ("Georgia Act") at O.C.G.A. § 46-5-163(a) which prohibits a telecommunications company from providing telecommunications services without a certificate of authority issued by the Commission.

³ Low Tech filed its application for certificate of authority to provide local exchange service with the GPSC on May 2, 1997 (two business days before the scheduled hearing in its arbitration); this application was assigned GPSC Docket No. 7587-U. Subsequently Low Tech was required to resubmit its application because it failed to comply with the Commission's Rule 515-3-1.11 regarding the submission of trade secret information. Pursuant to Georgia law at O.C.G.A. § 46-5-168(c), the GPSC must take final action no later than 180 days after the filing of the application, although the GPSC's practice is to take final action substantially prior to the statutory deadline on CLEC certificate applications.

Low Tech had erroneously argued that a reference to O.C.G.A. § 46-5-45 within § 46-5-163(a) implied that a certificate is not required in order to be a telecommunications carrier. However, O.C.G.A. § 46-5-45 does not authorize an entity to provide telecommunications services without a certificate of authority. Indeed, it indicates a contrary purpose because it provides that any interested person may file a complaint against an entity who is engaged in, or is about to engage in, the construction of telephone facilities without a certificate of authority from the Commission.

The GPSC properly concluded that requiring a company to obtain a certificate in order to be a telecommunications carrier and in order to be entitled to Section 252(b) arbitration is consistent with the 1996 Act and the FCC rules. Read together, Sections 251(c) and 252 of the 1996 Act quite clearly allow the compulsory arbitration of Section 252(b) to be initiated only by a telecommunications carrier.

Low Tech cited several sections of the FCC's First Report and Order⁴ to argue the FCC's intention to protect new entrants, such as Low Tech, from "burdensome regulations" in participating in arbitration proceedings. The Commission agreed that while these sections certainly support the overall goal of the Act to reduce regulatory burdens on resellers as well as other telecommunications companies, they do not eliminate competitively neutral state certification requirements.⁵ The Commission's power to require certifications is not preempted by the FCC regulations. Nor is the Commission persuaded that requiring certification is "burdensome."

Low Tech's motion for reconsideration argued, as it now argues to the FCC, that the GPSC should have conducted an arbitration despite its non-certificated status, because the GPSC has approved negotiated interconnection agreements with other entities that do not have certificates. That argument is to no avail. The GPSC recognized that under the FCC Interconnection Rules, there is a different standard for arbitration than for negotiation. The FCC Interconnection Rules state that the incumbent local exchange company ("ILEC") may not condition negotiation on certification. The incumbent LEC is required to enter into negotiations whether or not the requesting company is certificated.⁶ It would be untoward if successful negotiations then resulted in a contract that could be not submitted to and approved by the GPSC, and the GPSC's role in approving negotiated agreements is much lighter than its role in conducting arbitrations. By contrast, there is no similar

⁴ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (FCC Interconnection Rules)*, FCC 96-325, CC Docket No. 96-98, 11 FCC Rcd 15499 (August 8, 1996), *stayed in part pending judicial review sub nom. Iowa Util. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996), *vacated in part, Iowa Util. Bd. v. FCC*, U.S. Court of Appeals (8th Cir. 7/18/97).

⁵ See Section 253(b) of the Act.

⁶ 47 C.F.R. § 51.301(c)(4).

rule for arbitrations, and the GPSC is required to expend a very substantial amount of time and administrative resources in conducting arbitrations.

Many of the companies that have submitted applications to the GPSC already initiated negotiations with BellSouth prior to obtaining their certificates. But Low Tech is the first and only entity that has ever asked the GPSC to conduct compulsory arbitration but had not already obtained a certificate at the time of filing its arbitration petition. If the GPSC is required to conduct compulsory arbitrations at the behest of companies that may never become certificated in Georgia, then it may be forced to squander its resources in a manner that cannot have been contemplated by the framers of the Act.

The GPSC properly denied Low Tech's request that it not be required to obtain state certification. Allowing compulsory arbitration under these circumstances could force the GPSC to entertain compulsory arbitration cases litigated by companies that may never obtain certificates to provide any telecommunications services in Georgia. Such a result is not appropriate as a matter of public policy and does not appear to be a reasonable reading of the Act's jurisdictional requirements.

Low Tech's motion seeking the GPSC's reconsideration was based in part upon the argument that it should be considered a reseller, and therefore that its petition for arbitration was improperly dismissed, citing Section 251(b). However, the GPSC properly determined that not only is Low Tech not certificated as a local service reseller in Georgia, its petition for arbitration was premised upon its request that certain AIN and related items be made available as unbundled network elements under Section 251(c). Moreover, the GPSC was properly not persuaded that compulsory arbitration may be pursued under Section 252(b) by a non-certificated entity even if that entity pressed claims solely under Section 251(b)'s resale obligations. To be a reseller of local exchange services in Georgia, an entity must obtain a certificate pursuant to O.C.G.A. § 46-5-163. This is a valid requirement to which the Commission must defer under Section 253(b), which provides:

STATE REGULATORY AUTHORITY. — Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The GPSC agreed with the Georgia CUC that if Low Tech does obtain a certificate to provide telecommunications services in Georgia, it will not be made to wait an additional 135 to 160 days, after becoming certificated, to file a new petition for arbitration pursuant to Section 252(b)(1) of the 1996 Telecommunications Act. The statutory period cannot be waived as a matter of law. However, this case's jurisdictional issue was a question of first impression before this Commission. Low Tech has been in ongoing negotiations with BellSouth. Under these unique circumstances, the GPSC

found as a matter of fact that Low Tech's request for negotiations should be deemed a continuing request sufficient to meet the 135 to 160 day period in Section 252(b)(1).

Thus the GPSC properly dismissed Low Tech's petition for arbitration for lack of jurisdiction. Low Tech is not entitled to initiate compulsory arbitration before the GPSC under Section 252(b) -- or the Commission under Section 252(e)(5)) -- because it is not a certificated telecommunications carrier in Georgia. If Low Tech does obtain a certificate to provide telecommunications services in Georgia, it will not be made to wait an additional 135 days, after becoming certificated, to file a new petition for arbitration. If Low Tech becomes certificated and files a new petition for arbitration, the GPSC will deem the filing date to be the 135th day under Section 252(b)(1) and proceed to address any remaining issues with the arbitration sought by Low Tech.

CONCLUSION


For the above and foregoing reasons, the Georgia Public Service Commission respectfully comments, in opposition to Low Tech's petition for arbitration by the Federal Communications Commission, that Low Tech is not entitled to initiate (and the Commission does not have jurisdiction to conduct) arbitration pursuant to Section 252(e)(5). Therefore, the GPSC respectfully suggests that the Commission should dismiss Low Tech's petition in this proceeding.

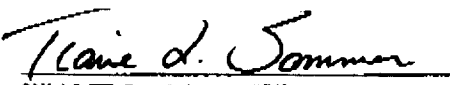
Respectfully submitted,

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Appendix A to GPSC
Comments 7/28/97
CC Docket No. 97-164

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MAY 19 1997

Docket No. 7270-U

EXECUTIVE SECRETARY
GPSC

ORDER DISMISSING ARBITRATION

In Re: Petition by Low Tech Designs, Inc. for Arbitration of Rates, Terms and Conditions
with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996

APPEARANCES

On behalf of Low Tech Designs, Inc.:
James M. Tennant, President

On behalf of BellSouth Telecommunications, Inc.:
Bennett Ross, Attorney
Fred McCallum, Attorney

On behalf of Consumers' Utility Counsel:
Ken Woods, Attorney

BY THE COMMISSION:

The Commission issues this Order dismissing without prejudice the arbitration petition of Low Tech Designs, Inc. ("Low Tech"). As discussed in this Order, the Commission dismisses Low Tech's petition on the basis that Low Tech is not, at least at this time, a telecommunications carrier proposing to provide telecommunications services in Georgia, and therefore is not entitled to initiate compulsory arbitration before this Commission under Section 252(b) of the Telecommunications Act of 1996 ("Act").

The parties in this docket are Low Tech Designs, Inc. and BellSouth Telecommunications, Inc. ("BellSouth"). The Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs ("Consumers' Utility Counsel," or "CUC") is a participant in this docket.

BACKGROUND:

Low Tech sought arbitration of rates, terms and conditions for a proposed agreement between it and BellSouth, and filed a petition before the Georgia Public Service Commission ("Commission") on January 16, 1997. Low Tech asked the Commission to conduct arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act") (47 U.S.C. § 252(b)) to resolve issues that were the subject of negotiations which commenced by formal request on August 19, 1996. Therefore, in accordance with Section 252(b)(4)(C) of the Act, the Commission must conclude the arbitration proceeding by May 19, 1997.

The Commission issued a Procedural Order on February 5, 1997. BellSouth filed an Answer and Motion to Dismiss on February 14, 1997. As authorized and directed by the Commission in the Procedural Order, Hearing Officer Smith conducted a pre-arbitration conference on March 10, 1997, at which time several matters were discussed, including the question of whether Low Tech was a telecommunications carrier proposing a telecommunications service. Both parties submitted separate statements summarizing the pre-arbitration conference, on March 17, 1997. Hearing Officer Smith issued his First Pre-Arbitration Hearing Order on March 28, 1997, ruling among other things that the issue of whether Low Tech was a telecommunications carrier proposing a telecommunications service had not been resolved and would be among the issues to be decided by the Commission.

The parties made additional filings related to discovery, and to written testimony which was prefiled on March 28 and 31, 1997 (direct) and April 4 and 7, 1997 (rebuttal). Hearing Officer Smith issued his Second Pre-Arbitration Hearing Officer Order Denying BellSouth's Motion to Quash on April 15, 1997.

BellSouth filed its second Motion to Dismiss on April 9, 1997, formalizing its argument that Low Tech is not a telecommunications carrier proposing a telecommunications service and on that basis may not initiate compulsory arbitration under Section 252(b). Low Tech filed a response to BellSouth's motion on April 11, 1997. The Commission took oral argument from both parties at the outset of the arbitration hearing on April 17, 1997. The Commission then took the motion under advisement, and postponed the arbitration hearing to May 6, 1997 to allow the Commission first to decide the motion to dismiss. Low Tech filed supplemental comments in opposition to BellSouth's motion to dismiss, on April 24, 1997, to which BellSouth filed a supplemental response on April 29, 1997.

The two fundamental questions presented by BellSouth's motion to dismiss are:

- (1) Is Low Tech a "telecommunications carrier" entitled to seek arbitration under Section 252(b) of the federal Telecommunications Act of 1996 ("1996 Act")?
- (2) Is Low Tech seeking to offer a "telecommunications service" under the 1996 Act?

As discussed below, the Commission concludes that Low Tech has not shown that it is a "telecommunications carrier" seeking to offer a "telecommunications service." Therefore, while there may be other methods by which Low Tech can seek to offer the type of service it proposes, Low Tech may not use Section 252(b) to invoke the Commission's jurisdiction for compulsory arbitration under the 1996 Act. This is an important jurisdictional question of first impression before this Commission.¹

(1) "Telecommunications Carrier"

Low Tech acknowledged at the oral argument that it had not obtained a certificate of authority, and at that time had not submitted an application for certificate of authority to provide telecommunications service in Georgia. This is the first time that a company seeking Section 252(b) arbitration in Georgia has not previously obtained a certificate from the Commission.

The Commission will not consider an entity to be a telecommunications carrier in Georgia, unless and until it has obtained a certificate of authority. Georgia's Telecommunications and Competition Development Act of 1995 ("Georgia Act") at O.C.G.A. § 46-5-163(a) provides that a telecommunications company shall not provide telecommunications services without a certificate of authority issued by the Commission. This type of certification requirement is not preempted by the 1996 Act, which provides at Section 253(b) [47 U.S.C. 253(b)] that nothing in that section ("removal of barriers to entry") "shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [universal service], requirements" such as the financial and technical capability required of competing local exchange companies ("CLECs") required by O.C.G.A. § 46-5-163(b).

Requiring that a company obtain a certificate in order to be a telecommunications carrier also furthers other reasonable, legitimate legislative objectives under the Georgia Act. Telecommunications carriers are subject to the Commission's jurisdiction, must meet applicable requirements of Georgia law including the Georgia Act, and must comply with the Commission's

¹ As an important question of first impression, it merits attention even at this relatively late stage of the arbitration. Moreover, while it would have been preferable for BellSouth to raise the issue in its initial Answer and Motion to Dismiss, this issue involves subject-matter jurisdiction and thus may be raised at any time, even for the first time in an appeal. See, e.g., *Evans v. Davey*, 154 Ga. App. 269, 267 S.E.2d 875 (Ct.App. 1980) (lack of jurisdiction to be considered whenever and however it may appear); *Georgia Consumer Ctr., Inc. v. Georgia Power Co.*, 150 Ga. App. 511, 258 S.E.2d 250 (Ct.App. 1979) *Lowe v. Payne*, 130 Ga. App. 337, 203 S.E.2d 309 (Ct.App. 1973). Cf. O.C.G.A. § 50-13-13(a)(6) which provides that in contested cases, the agency shall have authority, among other things, to rule on motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground. The Commission has not regarded Section 252(b) arbitrations as "contested cases" within the meaning of the Administrative Procedures Act, but the fundamental principle is the same which permits or requires dismissal for lack of subject-matter jurisdiction.

rules. The obligations of telecommunications carriers include contributing to the Universal Access Fund. The Commission cannot feasibly administer its responsibilities, determine who the telecommunications carriers are, and ensure that such carriers meet their obligations, unless there is a basic mechanism such as the certification requirement contained in O.C.G.A. § 46-5-163(a).

The duties and obligations of an incumbent local exchange company ("LEC") under Section 251 are owed to telecommunications carriers. A telecommunications carrier may initiate negotiations with an incumbent LEC, and the FCC has ruled that in order to negotiate in good faith, the incumbent LEC may not require that the requesting company have already obtained a certificate of authority. However, the FCC issued no such rule with respect to arbitrations.

BellSouth's arguments included an assertion that Low Tech must first show that it is providing a telecommunications service, even in another jurisdiction, before it qualifies as a telecommunications carrier eligible to enforce Section 251 and Section 252 requirements through compulsory arbitration. The Commission does not go so far in this ruling, however. A new entrant should not have to show that it actually provides telecommunications service somewhere, because such a rule would preclude a company that is just beginning its operations. Instead, the Commission rules that a new entrant will qualify as a telecommunications carrier before this Commission if it has obtained a certificate of authority to provide service in Georgia, whether or not it has already begun to provide telecommunications service in Georgia or elsewhere.

Low Tech filed supplemental comments citing to a Conference Report in support of its position. That Conference Report indicates that certain drafters of the 1996 Act believed that the duties under Section 251(b) are owed to telecommunications carriers or "other persons." Low Tech argued that this means any person or entity, even if it is not a telecommunications carrier, may seek to enforce the duties of another company under Section 251(b). Low Tech then extended this argument to assert that any person or entity, even if it is not a telecommunications carrier, may seek to enforce any of the duties under Section 251 and may seek arbitration under Section 252(b).

The Commission is not persuaded by Low Tech's interpretation of the Conference Report and the Act. Even if the Conference Report can be used to conclude that any person may obtain the benefit of a company's duties under Section 251(b), the Conference Report did not go on to extend this to Section 251(c). The explicit wording of Section 251(c) states that the negotiation relevant to Section 252 proceeds upon request of a telecommunications carrier. Read together, Sections 251(c) and 252 quite plainly allow the compulsory arbitration of Section 252(b) to be initiated only by a telecommunications carrier.

The Commission's jurisdiction to conduct compulsory arbitration under Section 252(b) relates to enforcing the incumbent LEC's Section 251(c) duties and obligations, which again are owed to telecommunications carriers. If instead Low Tech's arguments were accepted, then the Commission could be forced to entertain compulsory arbitration cases litigated by companies that may never obtain certificates to provide any telecommunications services in Georgia. Such a result would be

inappropriate as a matter of public policy and does not appear to be a reasonable reading of the 1996 Act's jurisdictional requirements. The Commission concludes that its jurisdiction to conduct a Section 252(b) arbitration does not extend to a petitioner that is not a telecommunications carrier.

The Commission concludes that a new entrant must first obtain a certificate of authority in order to demonstrate that it is a "telecommunications carrier" entitled to invoke the Commission's jurisdiction by initiating arbitration under the 1996 Act. An entity that lacks a certificate of authority does not qualify as a "telecommunications carrier" and thus is not entitled to initiate the compulsory arbitration under Section 252(b) of the Act.

(2) "Telecommunications Service"

In order to be a "telecommunications carrier," it is also necessary to offer a "telecommunications service." However, as Low Tech described its proposal, the proposed service does not appear to be a "telecommunications service." Low Tech explained at the oral argument that it proposes a least cost routing service in which the customer places a long-distance call relying upon Low Tech to identify and select the lowest-price long-distance provider. The local exchange service would still be provided by another carrier (such as BellSouth), and the long distance service would be provided by whichever carrier Low Tech routes the call to. Low Tech might place a charge on the customer's bill for the routing service, but the customer would still be billed for local and long-distance service by the other carriers.

The Act defines "telecommunications service" as the transmission, between or among points specified by the user, of information of the user's choosing, to the public for a fee. 47 U.S.C. § 3(43), (46). It appears that Low Tech would not provide transmission. Instead, Low Tech would provide two functions. The first is informational - identifying which long-distance carrier can carry the call for the lowest price (at least, from among those carriers which have contracted with Low Tech, similar to airlines which contract with travel agents). The second is routing the call, which appears to be an enhanced service. Using the travel agent analogy, it is like the agent booking the trip on the airline, which then pays a commission to the agent. The airline - or in this case, the long-distance carrier - then performs the function of carrying or transmission.

If Low Tech's proposed service were a "telecommunications service," then Low Tech could not provide it without obtaining a certificate of authority under O.C.G.A. § 46-5-163, filing tariffs, meeting universal service funding obligations, and otherwise meeting applicable Commission requirements for telecommunications carriers.

The Commission takes administrative notice that Low Tech submitted an application for a certificate of authority to provide local exchange service in Georgia.² Therefore in the proceedings

² By taking this administrative notice, the Commission is not ruling as to whether the application meets the Commission's requirements. Low Tech's certificate application shall be subject to the Commission's

upon Low Tech's certificate application, it will have another opportunity to show that its proposed service is a "telecommunications service."³

Based upon the factors discussed above, the Commission concludes that it should dismiss the arbitration in this docket for lack of jurisdiction. This dismissal is without prejudice, so that Low Tech is permitted to apply for a certificate of authority under O.C.G.A. § 46-5-163, and such application shall be judged on its own merits in determining whether Low Tech meets statutory requirements for a certificate, whether it proposes to offer a "telecommunications service," and whether such service is local exchange service or some other type of "telecommunications service." In addition, this dismissal without prejudice means that if Low Tech obtains a certificate of authority, then it may submit a new petition for arbitration if necessary and if all other applicable requirements under Sections 251 and 252 are met.


WHEREFORE IT IS ORDERED that:

- A. The arbitration petition filed by Low Tech Designs, Inc. on January 16, 1997 in this docket is dismissed without prejudice.
- B. The Commission hereby adopts all statements of fact, law, and regulatory policy contained within the preceding sections of this Order as the Commission's findings of fact, conclusions of law, and decisions of regulatory policy.
- C. A motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.
- D. Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

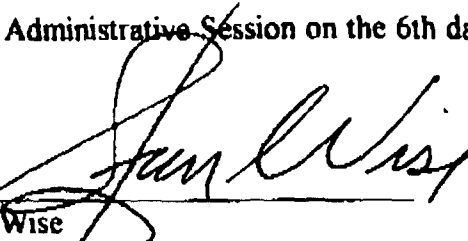
standard review procedures.

³ Low Tech might argue that the definition under Georgia law at O.C.G.A. § 46-5-162(18) is broader, which would not allow jurisdiction for federal arbitration but might permit state certification and any remedy that might be available under the Georgia Act. However, interconnection and access to unbundled services under O.C.G.A. § 46-5-164(a) is only required for requesting "certificated local exchange carriers." In addition, this decision to dismiss the arbitration petition under Section 252(b) shall not be taken to state or imply an opinion about whether Low Tech could be construed as a "telecommunications carrier" under the Georgia Act at O.C.G.A. § 46-5-162(18). Nor shall this decision be taken to state or imply an opinion as to whether Georgia law provides for Commission jurisdiction to grant Low Tech the Star Code abbreviated dialing, Advanced Intelligent Network ("AIN") unbundling, or other matters that Low Tech sought by its arbitration petition.

The above by action of the Commission in Administrative Session on the 6th day of May, 1997.


Terri M. Lyndall
Executive Secretary

5/16/97
Date


Stan Wise
Chairman

5-16-97
Date

DISSENT

The Commission in its majority decision has dismissed the arbitration sought by Low Tech Designs, Inc. ("Low Tech"). I believe that the Commission should instead have proceeded to hear the merits of the arbitration, and therefore I dissent.

Low Tech filed its Petition on January 16, 1997. BellSouth's initial Answer and Motion to Dismiss did not put forward the argument that Low Tech was not a telecommunications carrier, and indeed, BellSouth's Answer admitted that Low Tech is a telecommunications carrier. Not until April 9, 1997 - approximately one week prior to the scheduled hearing - did BellSouth file a Motion to Dismiss alleging that Low Tech is not a telecommunications carrier and is not providing a telecommunications service.

BellSouth argued that Low Tech must first show that it is providing a telecommunications service in some jurisdiction. Even the majority decision rejects that proposition, because it clearly discriminates against a new company that has not been able to provide service yet. BellSouth's argument would prevent a new entrant from ever entering the business.

However, the majority decision proceeded to conclude that Low Tech is not entitled to arbitration on the basis of not being a telecommunications carrier and not providing a telecommunications service. I disagree with this decision. First, after rejecting BellSouth's restrictive and discriminatory interpretation, the majority went on to find its own basis for dismissing the arbitration. Second, even BellSouth failed to raise these issues until three months after Low Tech filed its petition; this was not timely, by BellSouth. Finally, and most fundamentally, this Commission has not afforded Low Tech the same opportunity to press its case that has been afforded to all the other companies that have filed for arbitration - ACSI, AT&T, Bell Atlantic NYNEX Mobile, MCI, MFS, and Sprint. This Commission's responsibility to help foster a competitive telecommunications marketplace will be much better discharged when the Commission provides speedy resolution of complaints brought to it by all market participants.

The arbitration hearing was set to proceed on April 17, 1997, immediately after oral argument on BellSouth's motion. The Commission should have proceeded to conduct the hearing and consider Low Tech's petition on its merits. Therefore, for the foregoing reasons, I dissent from the majority's dismissal of the petition.

MAY 15, 1997
Date

Mac Barber
Mac Barber
Commissioner

COMMISSIONERS:

STAN WISE, CHAIRMAN
DAVID N. BAKER
ROBERT B. (BOBBY) BAKER
MAC BARBER
BOB DURDEN



Appendix B to GPSC
Comments 7/28/97
CC Docket No. 97-164
DEBORAH K. FLANNAGAN
EXECUTIVE DIRECTOR
TERRI M. LYNDALL
EXECUTIVE SECRETARY

Georgia Public Service Commission

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EXECUTIVE SECRETARY
G.P.S.C.

Docket No. 7270-U

ORDER DENYING MOTION FOR RECONSIDERATION, REHEARING AND ORAL ARGUMENT

In Re: Petition by Low Tech Designs, Inc. for Arbitration of Rates, Terms and Conditions
with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996

Commission Decision:	May 6, 1997
Order Issued:	May 19, 1997
Decision on Motion for Reconsideration:	June 19, 1997

APPEARANCES

On behalf of Low Tech Designs, Inc.:
James M. Tennant, President

On behalf of BellSouth Telecommunications, Inc.:
Bennett Ross, Attorney
Fred McCallum, Attorney

On behalf of Consumers' Utility Counsel:
Jim Hurt, Attorney
Ken Woods, Attorney

BY THE COMMISSION:

The Commission issues this Order to deny Low Tech Designs, Inc.'s ("Low Tech") Motion for Reconsideration, Rehearing and Oral Argument regarding the Commission's Order Dismissing

Arbitration.¹ By issuing this Order, the Commission affirms its May 19, 1997 ruling which dismissed Low Tech's arbitration petition for lack of subject-matter jurisdiction. Low Tech is not a certificated telecommunication carrier in Georgia, and therefore it is not eligible to invoke the arbitration jurisdiction of this Commission.

The Commission adopts the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs' ("Consumers' Utility Counsel" or "CUC") recommendation that if Low Tech becomes certificated to provide telecommunications services in Georgia, it will not have to wait 135 days, after becoming certificated, to file a new petition for arbitration pursuant to Section 252(b)(1) of the 1996 Telecommunications Act (the "Act") (47 U.S.C. § 252 (b)(1)).

BACKGROUND

Low Tech filed a petition before the Georgia Public Service Commission ("Commission") on January 16, 1997, seeking arbitration of rates, terms and conditions for a proposed agreement between it and BellSouth Telecommunications, Inc. ("BellSouth"). Low Tech asked the Commission to conduct arbitration pursuant to Section 252(b) of the 1996 Act to resolve issues that were the subject of negotiations which commenced by formal request on August 19, 1996. Therefore, the statutory deadline for that arbitration was May 19, 1997 in accordance with Section 252(b)(4)(C) of the 1996 Act.

On May 19, 1997, the Commission entered an Order dismissing without prejudice the arbitration petition of Low Tech. The Commission dismissed Low Tech's petition on the basis that Low Tech was not a telecommunications carrier proposing to provide telecommunications services in Georgia, and therefore was not entitled to initiate compulsory arbitration before the Commission under Section 252(b) of the 1996 Act.

On May 27, 1997, Low Tech filed a Motion for Reconsideration, Rehearing and Oral Argument of Commission Order Dismissing the Arbitration. Low Tech's motion asked for a complete arbitration in the docket. In the alternative, Low Tech moved for a formal rehearing and oral argument. Also, if the Commission refused all of the above requests, then Low Tech further requested that the Commission jointly approach the Federal Communications Commission ("FCC") for rulings regarding eligibility for arbitration of the least cost routing service that Low Tech proposes to offer.

BellSouth filed a Response to Low Tech Designs, Inc.'s Motion for Reconsideration on June 10, 1997. BellSouth argued that the Commission's May 19, 1997 Order is consistent with the Telecommunications Act of 1996 and is not in conflict with Georgia law. Accordingly, BellSouth requested the Commission to deny Low Tech's motion for reconsideration.

¹ See *Order Dismissing Arbitration* issued by the Commission on May 19, 1997.

The CUC filed a letter with the Commission on June 16, 1997, generally supporting Low Tech. The CUC also urged the Commission to clearly state, if it denies the motion for rehearing, that if Low Tech is certificated to provide telecommunications services in Georgia, then the Commission would not require Low Tech to wait for the full period under the Telecommunications Act of 1996 prior to filing another petition for arbitration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission affirms its previous position that it will not consider an entity to be a telecommunications carrier in Georgia, unless and until it has obtained a certificate of authority from this Commission. This requirement is based on the provisions in Georgia's Telecommunications and Competition Development Act of 1995 ("Georgia Act") at O.C.G.A. § 46-5-163(a) which prohibits a telecommunications company from providing telecommunications services without a certificate of authority issued by the Commission.

The Commission is not persuaded by Low Tech's interpretation of the Georgia Act's reference of § 46-5-45 within § 46-5-163(a). The Commission agrees with BellSouth that § 46-5-45 does not authorize an entity to provide telecommunications services without a certificate of authority. Indeed, it indicates a contrary purpose by providing that any interested person may file a complaint against an entity who is engaged in, or is about to engage in, the construction of telephone facilities without authorization from the Commission.

The Commission concludes that requiring a company to obtain a certificate in order to be a telecommunications carrier and in order to be entitled to Section 252(b) arbitration is consistent with the 1996 Act and the FCC rules. Read together, Sections 251(c) and 252 of the 1996 Act quite clearly allow the compulsory arbitration of Section 252(b) to be initiated only by a telecommunications carrier.

Low Tech cites several sections of the FCC's First Report and Order² to argue the FCC's intention to protect new entrants, such as Low Tech, from "burdensome regulations" in participating in arbitration proceedings. The Commission agrees with BellSouth that while these sections certainly support the overall goal of the Act to reduce regulatory burdens on resellers as well as other telecommunications companies, they do not eliminate competitively neutral state certification requirements.³ The Commission's power to require certifications is not preempted by the FCC regulations. Nor is the Commission persuaded that requiring certification is "burdensome."

² First Report and Order In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (FCC Interconnection Rules), FCC 96-325, CC Docket No. 96-98, 11 FCC Rcd 15499 (August 8, 1996), *stayed in part pending judicial review sub nom. Iowa Utils Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

³ See 1996 Telecommunications Act, Section 253(b).

The Commission affirms its previous position that under FCC rules, there is a different standard for arbitration than for negotiation. The FCC rules state that the incumbent Local Exchange Company (LEC) may not condition negotiation on certification. The incumbent LEC is required to enter into negotiations whether or not the requesting company is certificated.⁴ There is no similar rule for arbitrations. The Commission properly denied Low Tech's request that the state certification requirement be waived. Allowing such a waiver could force the Commission to entertain compulsory arbitration cases litigated by companies that may never obtain certificates to provide any telecommunications services in Georgia. Such a result is not appropriate as a matter of public policy and does not appear to be a reasonable reading of the 1996 Act's jurisdictional requirements.

Low Tech's motion for reconsideration was based in part upon the argument that it should be considered a reseller, and therefore that its petition for arbitration was improperly dismissed, citing Section 251(b). However, not only is Low Tech not certificated as a local service reseller in Georgia, its petition for arbitration was premised upon its request that certain AIN and related items be made available as unbundled network elements under Section 251(c). Moreover, the Commission is not persuaded that compulsory arbitration may be pursued under Section 252(b) by a non-certificated entity even if that entity pressed claims solely under Section 251(b)'s resale obligations. To be a reseller, an entity must obtain a certificate pursuant to O.C.G.A. § 46-5-163.

If Low Tech believes that the Commission should have conducted an arbitration and improperly failed to do so, Section 252(e) provides a procedure whereby Low Tech could petition the FCC to conduct the arbitration that it seeks.

The Commission agrees with the CUC that if Low Tech does obtain a certificate to provide telecommunications services in Georgia, it will not be made to wait an additional 135 to 160 days, after becoming certificated, to file a new petition for arbitration pursuant to Section 252(b)(1) of the 1996 Telecommunications Act. The statutory period cannot be waived as a matter of law. However, this case's jurisdictional issue was a question of first impression before this Commission. Low Tech has been in ongoing negotiations with BellSouth. Under these unique circumstances, Low Tech's request for negotiations should be deemed a continuing request sufficient as a matter of fact to meet the 135 to 160 day period in Section 252(b)(1). No purpose would be served by further delay in arbitrating these issues on the merits at that point.

For the foregoing reasons, the Commission affirms its May 19, 1997 decision dismissing the arbitration in this docket for lack of jurisdiction. Low Tech is not entitled to initiate compulsory arbitration before this Commission under Section 252(b) of the 1996 Act because it is not a certificated telecommunications carrier in Georgia. In addition, the Commission concludes that if Low Tech does obtain a certificate to provide telecommunications services in Georgia, it will not be made to wait an additional 135 days, after becoming certificated, to file a new petition for

⁴ 47 C.F.R. § 51.301(c)(4).

arbitration. If Low Tech becomes certificated and files a new petition for arbitration, the Commission will deem the filing date to be the 135th day under Section 252(b)(1).

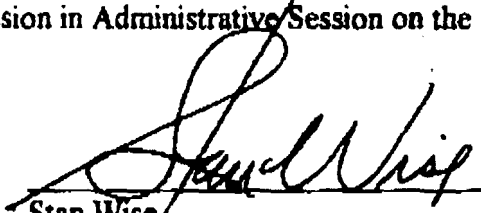
WHEREFORE IT IS ORDERED that:

- A. Low Tech's motion for reconsideration, rehearing, and oral argument is denied. The Commission affirms its May 19, 1997 Order Dismissing Arbitration as discussed in the preceding sections of this Order.
- B. If Low Tech obtains a certificate from this Commission to provide telecommunications services in Georgia, it may file a new petition for arbitration and the Commission will deem the filing date to be the 135th day pursuant to Section 252(b)(1) of the 1996 Telecommunications Act.
- C. The Commission hereby adopts all statements of fact, law, and regulatory policy contained within the preceding sections of this Order as the Commission's findings of fact, conclusions of law, and decisions of regulatory policy.
- D. A motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.
- E. Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 19th day of June, 1997.


Deborah K. Flannagan
Executive Director

7/7/97
Date


Stan Wise
Chairman

7-7-97
Date

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In re:)
Petition for Commission Assumption) CC Docket No. 97-164
of Jurisdiction of Low Tech Designs, Inc.'s)
Petition for Arbitration with BellSouth)
Before the Georgia Public Service Commission)

CERTIFICATE OF SERVICE

I hereby certify that the Comments of the Georgia Public Service Commission ("GPSC") in Opposition to the Petition of Low Tech Designs, Inc. ("Low Tech") in the above-referenced docket were filed with the Federal Communications Commission, and were hand-delivered and faxed as well as sent by first-class mail to the following parties and persons, this 28th day of July, 1997:

James M. Tennant
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Robert Sutherland
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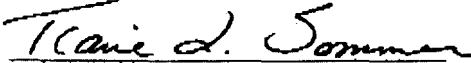
This the 28th day of July, 1997.

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